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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Paper No. 22

Application Number: 09/432,485

Filing Date: 11/1/1999

Appellant(s): Strumolo et al.

Daniel H. Bliss

For Appellant



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Please find below and/or attached an Office communication concerning this application or proceeding.

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EXAMINER'S ANSWER

This is in response to the appeal brief filed 10/24/2003.

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

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(5) ***Summary of Invention***

The summary of the *claimed* invention contained in the brief is not agreed with for the following reasons.

The MPEP requires that the summary of the invention be:

“A *concise* explanation of the invention *defined in the claims* involved in the appeal, which shall refer to the specification by page and line number, and to the drawing, if any, by reference characters.”

Appellants have not specifically mapped the claims to the “*Summary of the Invention*”.

MPEP section 1200 recites, in part:

“Summary of Invention. A concise explanation of the invention defined in the claims involved in the appeal. This explanation is required to refer to the specification by page and line number, and, if there is a drawing, to the drawing by reference characters. Where applicable, it is preferable to read the appealed claims on the specification and any drawing. While reference to page and line number of the specification may require somewhat more detail than simply summarizing the invention, it is considered important to enable the Board to more quickly determine where the claimed subject matter is described in the application.”

Appellants’ lengthy summary is not concise and in fact merely repeats most of the specification. Furthermore, most of the features recited in the summary are not actually claimed. The Examiner considers lines 5-19, page 3 of the specification to be a more accurate summary of the invention.

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(6) Issues

The appellant's statement of the issues in the brief is correct with the following exception.

The Strumolo '300 102 (e) rejection is withdrawn because Appellants state that it does not qualify as prior art.

(7) Grouping of Claims

The appellant's statement in the brief that certain claims do not stand or fall together is not agreed with because Appellant's brief does not include a statement that this grouping of claims does not stand or fall together and *reasons in support thereof*. See 37 CFR 1.192(c)(7).

Section 1200 provides guidance:

(7) Grouping of Claims. For each ground of rejection which appellant contests and which applies to a group of two or more claims, the Board shall select a single claim from the group and shall decide the appeal as to the ground of rejection on the basis of that claim alone, unless a statement is included that the claims of the group do not stand or fall together and, in the argument section of the brief (37 CFR 1.192(c)(8)), appellant explains why the claims of the group are believed to be separately patentable. Merely pointing out differences in what the claims cover is not an argument as to why the claims are separately patentable. If an appealed ground of rejection applies to more than one claim and appellant considers the rejected claims to be separately patentable, 37 CFR 1.192(c)(7) requires appellant to state that the claims do not stand or fall together, and to present in the appropriate part or parts of the argument under 37 CFR 1.192(c)(8) the reasons why they are considered separately patentable. The absence of such a statement and argument is a concession by the applicant that, if the ground of rejection were sustained as to any one of the rejected claims, it will be equally applicable to all of them. ...

. The rationale behind the rule, as amended, is to make the appeal process as efficient as possible. Thus, while the Board will consider each separately argued claim, the work of the Board can be done in a more efficient manner by selecting a single claim from a group of claims when the appellant does not meet the requirements of 37 CFR 1.192(c)(7). It should be noted that 37 CFR 1.192(c)(7) requires the appellant to perform two affirmative acts in his or her brief in order to have the separate patentability of a plurality of claims subject to the same rejection considered. The appellant must (A) state that the claims do not stand or fall together and (B) present arguments why the claims subject to the same rejection are separately patentable. Where the appellant does neither, the claims will be treated as standing or falling together. Where, however, the appellant (A) omits the statement required by 37 CFR 1.192(c)(7) yet presents arguments in the argument section of the brief, or (B) includes the statement required by 37 CFR 1.192(c)(7) to the effect that one or more claims do not stand or fall together (i.e., that they are separately patentable) yet does not offer argument in support thereof in the "Argument" section of the brief, the appellant should be notified of the noncompliance as per 37 CFR 1.192(d). Ex parte Schier, 21 USPQ2d 1016 (Bd. Pat. App. & Int. 1991); Ex parte Ohsumi, 21 USPQ2d 1020 (Bd. Pat. App. & Int. 1991).

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The Examiner considers claims 1-6 to be a single group.

(8) *ClaimsAppealed*

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) *Prior Art of Record*

The following is a listing of the prior art of record relied upon in the rejection of claims under appeal.

5,568,404

Stromolo (*Applicants*)

10/22/1996

Miller et al. "Transient CFD Simulations of a Bell Sprayer" Society of Automotive Engineers (# 982291, 9/1998), pp. 1-9. *Applicant's Prior publication.*

Kinema/Sim Manual - Chapters 1-15; ArSciMed, 1996.

(10) *Grounds of Rejection*

The following ground(s) of rejection are applicable to the appealed claims

Claims 1-6 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Miller et al. (Appellants' IDS - *Appellants' prior publication*).

Miller et al. disclose transient CFD simulations of a bell sprayer, including: "PowerFlow" (section 2.1 - particle simulation); SpraySim (section 2.2 - droplet flow simulation); relocatable sources and paint trajectories (figures 1-5).

Claims 1-6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kinema/SIM (ArSciMed, 1996) in view of Strumolo (U. S. Patent 5,568,404 - applicant) or Miller et al..

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The claims recite simulation of particle trajectory past an automobile including details concerning the source(s) representing particle creation (wherein the particles are paint droplets).

Kinema/SIM (K) discloses: a detailed and comprehensive particle simulation package which can model a diverse range of physical phenomena involving particle creation and sources, particle flow (taking into account the effects of gravity, electric and magnetic fields, drag, etc.) and collisions of particles with themselves or other objects and surfaces. Kinema/SIM is a software tool that presents a simulation space for particle behavior where you can construct and animate complex physical phenomena. See entire disclosure. A number of features are subsequently listed for Applicant's benefit.

- Examples of the graphical interface are shown on pp. 1-8 to 1-9;
- the "particle window" is shown on pg. 2-7; here the particle parameters can be altered;
- "Lifetime" defines the particle lifetime (pg. 2-9);
- "particle geometry" is discussed on pg. 2-11;
- "coordinate systems" are discussed on pg. 3-3;
- entering particle parameter values via slider buttons (pg. 3-10);
- probability functions for particle speed, lifetime, emission angles (pg. 3-11);
- other relevant temporal parameters (pg. 3-16);
- GUI simulation controls (pg. 5-2);

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- statistical features (ie., group behavior - pg. 5-3);
- particles, obstacles (pg. 5-5);
- details about simulation parameter values including source rate, display, particle interactions and emission sources (chapter 6);
- range of interactions between particles (pg. 6-3);
- source rate (pg. 6-4);
- a combined particle (pg. 6-5), wherein

"The Euler mode, on the other hand, calculates forces more globally and therefore has the advantage of maintaining simulation speed. It calculates only one force per cell at time t, which is applied to all particles in the cell ...";

- Chapter 7 discloses "Particles": details concerning particles; pg. 7-1 discloses:

"Particles are the key element in Kinema/SIM simulations. They are point objects that can represent a broad range of physical and image characteristics such as mass, charge, color, motion, and geometry. In your simulation, particles can represent a diversity of real or image objects such as quantum physics particles, gas molecules, aerosol droplets, bacteria, fluid flow, dust, rain, snow, sand or pixels of images. The possibilities are as numerous as the phenomena of reality and creative animation. ... Particles are emitted into the simulation via sources which can be visible or invisible points or geometric objects positioned in simulation space. ... Parameters such as lifetime, mass, drag, and coupling will characterize your particle's dynamics and interactions in the simulation."

- particle coupling (pg. 7-1);
- particle examples (pg. 7-1), wherein

"Particles are the key element in Kinema/SIM simulations. They are point objects that can represent a broad range of physical and image characteristics such as mass, charge, color, motion and geometry. In your simulation, particles can represent a diversity of real or image objects such as quantum physics particles, gas molecules, aerosol droplets, bacteria, fluid flow, dust, rain, snow, sand, or pixels of images. The possibilities are as numerous as the phenomena of reality and creative animation ...

... Particles are emitted into the simulation via sources which can be visible or invisible points or geometric objects positioned in simulation space. ...";

- particles parameter window (pg. 7-3 to 7-4);

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- "Sigma", a parameter related to particle-particle interactions (pp. 7-13 to 7-14);
- decay particles (pg. 7-21);
- particle coupling (pp. 7-22 to 7-23);
- Chapter 8 (source parameters);
- sources (pg. 8-1), wherein

"Sources are origins that emit particles into the simulation, and all particles must enter the simulation via a source. Sources can be points or have spatial geometry which you can choose to see or hide in simulation space. You can define as many sources as you like for a system, but each source is restricted to emit only one particle type. (If you want to have more than one particle type originate from the same position, you can superimpose sources at the point. ...

... In the source window you assign a particle type to the source and then define the rate and speed of the particles along with their spread angle into the simulation. ..."

- chapter 8: "Sources": details concerning sources; pg. 8-1 discloses:

"Sources are origins that emit particles into the simulation, and all particles must enter the simulation via a source. ... Sources can represent numerous analogs linked to their emission of particles. For example, they could represent nozzles or orifices spraying droplets or gases (particles) into the simulation, clouds releasing rain, or nuclei emitting nuclear particles. ... In the source window you assign a particle type to the source and then define the rate and speed of the particles along with their spread angle as they are emitted into the simulation. Parameters that affect the source presence and behavior in the simulation include positioning, rotation, size scaling, orientation, and emission geometry."

- source window (pg. 8-3);
- source rate (pg. 8-4);
- Spread (pg. 8-5);
- speed (pg. 8-6);
- source position (pg. 8-10);
- display (pg. 8-11);
- geometry (pg. 8-13);
- particle emission and geometry (pp. 8-15 to 8-16);

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- particle generation (pp. 8-16 to 8-17);

- Chapter 9 “Obstacles”: details concerning interactions of particles with macroscopic objects (an automobile body, for instance); pg. 9-1 discloses:

“Obstacles are geometric objects placed in the system to interact with particles. You can define as many obstacles as you like for a system. An obstacle can interact with each particle in a global manner or in a specific way. For example, a global interaction may have all particles bounce off the obstacle.”

- chapter 11: “The gravity fields”: details concerning global constraints on particle motion, namely gravity.;

- chapter 12: “Setting up drag fields”: details concerning drag fields; pg. 12-1 discloses:

“Kinema/SIM allows you to construct various types of drag fields in your simulation to introduce the force effects of moving media such as water flow and wind. The types of drag fields that can be set up with Kinema/SIM are global fields, turbulent fields, local fields, and vector flow.”

- Chapter 13, “electric fields”;

- Chapter 15, “particle events”;

- elastic and inelastic particle collisions (pp. 15-1 to 15-2);

17. Kinema/SIM does not specifically teach simulating paint droplet particle flow past an automobile (in other words, a virtual wind tunnel).

18. Strumolo discloses a virtual wind tunnel (*In particular, note: S: abstract; fig. 2a, 5, 9-10, 16-19, 22; col. 1, line 59 to col. 2, line 46; col. 17, line 61 to col. 18, line 67; col. 20, lines 9-37; col. 21, line 57 to col. 22, line 52*). Strumolo does not teach particle trajectories of paint droplets but does teach simulation of particle flow past automobile bodies.

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19. Miller et al. disclose transient CFD simulations of a bell sprayer, including: "PowerFlow" (section 2.1 - particle simulation); SpraySim (section 2.2 - droplet flow simulation); relocatable sources and paint trajectories (figures 1-5).

20. It would have been obvious to one of ordinary skill in the art at the time of the invention to model paint droplet flow past an automobile because this would result in cost reductions as the paint would be applied more efficiently. In any case, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). Applicants are claiming an intended use for their earlier disclosure relating to simulation of particle flow past a simulated automobile.

(11) *Response to Argument*

- Response to Argument - Miller et al. 102 Rejections:

- Miller et al. disclose transient CFD simulations of a bell sprayer, including: "PowerFlow" (section 2.1 - particle simulation); SpraySim (section 2.2 - droplet flow simulation); relocatable sources and paint trajectories (figures 1-5). Note section 4 (Conclusion).

Appellants basic allegation is that Miller et al. does not disclose the graphical interface as disclosed in the specification.

It is instructive to review figure 5 of the Miller et al. paper and the corresponding caption (col. 1, page 7) which recites:

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“Figures 5A-5D show the sensitivity of bell and shaping air speed on transfer efficiency. Here we are using PTE in a qualitative manner, i.e., any change in bell operating condition which increases the radius...”

It continues with:

“Figures 5A-5D decrease the shaping air magnitude from 30 m/s to 10 m/s. These figures have been slightly rotated to view more of the 3-D nature of the graphical display created by SpraySIM.”

Compare the above with figure 9 (specification) and lines 17-20, page 14 of the specification, which recites:

“FIGS. 9D-9F decrease the shaping air magnitude from 30 m/s to 10 m/s. These figures are slightly rotated to view more of the 3-D nature of the graphical display created by the method.”

The two figures are identical. Substitute “SpraySIM” with “*the method*” and the two passages are identical. The Examiner is forced to conclude that the graphical method in the specification is none other than SpraySIM graphical interface in Miller et al.

Also note Appellants’ admission [in reponse to the 103 rejections (last paragraph, page 31, Appeal Brief)] wherein Appellants admit:

“Additionally, in Miller et al. ‘291, *the SAE paper only describes the results of using a system, according to the present invention*, and details of how the vehicle design is

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introduced, the flow fields calculated, and how one interacts with the system to produce an analysis (and modify the paint spray system for additional analysis) is not shown.” (Emphasis added).

Even if the Miller et al. ‘291, the SAE paper only ***describes the results of using a system, according to the present invention***, but lacks the “details” (this allegation is not agreed to by the Examiner), it is noted that **Appellants have admitted that the system was in use for more than one year**. The Examiner can only conclude that the “missing details” were known to skilled artisans since the system was used to obtain identical results. A reference anticipates a claim if it discloses the claimed invention such that a skilled artisan could take its teachings combination with his own knowledge of the particular art and be in possession of the invention. *In re Graves*, 36 USPQ2d 1697 (Fed. Cir. 1995); *In re Sasse*, 207 USPQ 107 (CCPA 1980); *In re Samour*, 197 USPQ 1 (CCPA 1978).

Note that figures 3, 4, 5 in Miller et al. correspond to figures 5, 8, 9 of the specification. Also, note that figures 3-4 of U. S. Patent 6,263,300 (Applicants) correspond to figures 3-4 in the specification (Applicants have previously argued that the ‘300 patent does not disclose the claimed graphical features. It appears that Appellants’ use of the graphical interface is merely intended use for their previously disclosed graphical interface).

Applicant are claiming use of a particle injector in a *simulation* of particle (paint droplets) impact on a simulated automobile using simulated sources. Claim 5, for example, recites “repositioning the paint spray gun...”. In so far as a study of the specification and the claim

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preamble indicates that Applicants are claiming a simulation, it is clear that “repositioning” refers to changing the *simulated* position of the *simulated* source.

The Examiner notes that the claim preambles recite “designing a vehicle”; however, the claims are directed to painting a previously designed vehicle. Furthermore, the Examiner interprets that the claims fundamentally disclose simulation of paint droplet flow past an object, wherein it is intended to apply the paint to a vehicle. It is noted that a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963). Applicants are claiming an intended use for their earlier disclosure relating to simulation of particle flow past a simulated automobile.

Applicants appear to allege that “*spray gun placement* “*code means*” and “*trajectory determination* “*code means*” are not disclosed in the prior art. Appellants also appear to allege that the prior art is not enabled (lines 10-16, page 9, Appeal Brief). It was earlier (and remains) noted that Applicants have not disclosed any code in the specification to any greater degree than disclosed in the prior art. In fact, the code means appears to refer to “PowerFlow” developed by EXA (see the Miller et al. non-patent art for a disclosure of PowerFlow).

The Examiner maintains the rejections and would also like to point out that a reference anticipates a claim if it discloses the claimed invention such that a skilled artisan could take its

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teachings combination with his own knowledge of the particular art and be in possession of the invention. *In re Graves*, 36 USPQ2d 1697 (Fed. Cir. 1995); *In re Sasse*, 207 USPQ 107 (CCPA 1980); *In re Samour*, 197 USPQ 1 (CCPA 1978). Applicant's have only referred to a limited portion of the indicated disclosures and then recited the claim language - such arguments are not persuasive because they do not specifically point out how the language of the claims *patently distinguishes* them from the references.

- Response to Argument - Effective Filing Date:

It is noted that Appellants state for the record (first full paragraph, page 17, Appeal Brief) that:

“Strumolo et al. ‘300 does not disclose or anticipate the claimed invention of claims 1 through 4”. Similar statements relating to the other claims as per the ‘300 patent are made throughout the Appeal Brief. However, at the same time Appellants have made the instant application a Continuation-In-Part of the ‘300 patent. Therefore, the effective date for the claimed invention is that of the instant application, namely, 11/1/1999 because the instant claims do not have 112 support in the ‘300 patent. See MPEP section 706.02 which recites:

“DETERMINING THE EFFECTIVE FILING DATE OF THE APPLICATION

The effective filing date of a U.S. application may be determined as follows:

(A) If the application is a continuation or divisional of one or more earlier U.S. applications and if the requirements of 35 U.S.C. 120 have been satisfied, the effective filing date is the same as the earliest filing date in the line of continuation or divisional applications.

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(B) If the application is a continuation-in-part of an earlier U.S. application, any claims in the new application not supported by the specification and claims of the parent application have an effective filing date equal to the filing date of the new application. Any claims which are fully supported under 35 U.S.C. 112 by the earlier parent application have the effective filing date of that earlier parent application."

- Response to Argument - 103 Rejections:

Applicant's arguments are not persuasive. In general, Appellants have relied on piecemeal analysis of the applied references without any real attempt to address the motivation to combine. Appellants, in general, have not even addressed the cited portions of the applied prior art. Instead, Appellants merely recite the claims and opine that they are not disclosed in the prior art. Furthermore, Appellants attempts to denigrate the art are, respectfully not relevant. For example, Appellants opine (lines 7-8, page 26, Appeal Brief) that:

"Additionally, Kinema/SIM is related to the entertainment field and could not produce useful engineering results for an automotive application."

This allegation is not supported by any facts, nor have Appellants attempted to provide such evidence. A cursory reading of the Kinema/SIM manual will demonstrate the opposite. In fact (see Page 3) Kinema/SIM discloses: a detailed and comprehensive particle simulation package which can model a diverse range of physical phenomena involving particle creation and sources, particle flow (taking into account the effects of gravity, electric and magnetic fields, drag, etc.) and collisions of particles with themselves or other objects and surfaces. Kinema/SIM is a software tool that presents a simulation space for particle behavior where you can construct and animate complex physical phenomena.

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Applicants have recited legal decisions relating to obviousness and 103 rejections. The Examiner is well aware of these decisions. Applicants have further alleged that the combination of references is improper without actually addressing the combination of references and stated motivation to combine said references.

Appellants admit (last paragraph, page 31, Appeal Brief):

“Additionally, in Miller et al. ‘291, *the SAE paper only describes the results of using a system, according to the present invention*, and details of how the vehicle design is introduced, the flow fields calculated, and how one interacts with the system to produce an analysis (and modify the paint spray system for additional analysis) is not shown.” (Emphasis added).

Even if the Miller et al. ‘291, the SAE paper only *describes the results of using a system, according to the present invention*, but lacks the “details” (this allegation is not agreed to by the Examiner), it is noted that Appellants have admitted that the system was in use for more than one year. The Examiner can only conclude that the “missing details” were known to skilled artisans since the system was used to obtain identical results. A reference anticipates a claim if it discloses the claimed invention such that a skilled artisan could take its teachings combination with his own knowledge of the particular art and be in possession of the invention. *In re Graves*, 36 USPQ2d 1697 (Fed. Cir. 1995); *In re Sasse*, 207 USPQ 107 (CCPA 1980); *In re Samour*, 197 USPQ 1 (CCPA 1978).

Appellants then then conclude (last three lines, page 31, specification):

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“As such, there is no motivation in the art to combine Kinema/SIM, Strumolo et al. ‘404, and Miller et al. ‘291 together.”

Respectfully, this is a piecemeal analysis. Furthermore, there are two different combinations, namely, Kinema/SIM in view of Strumolo and Kinmea/SIM in view of Miller et al.. The Examiner did not combine all three together.

In response to applicant's argument that 1) the motivation to combine must be found in the reference and 2) there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found *either* in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the Examiner has argued that it would have been obvious to one of ordinary skill in the art at the time of the invention to model paint droplet flow past an automobile because this would result in cost reductions as the paint would be applied more efficiently. *Applicants have never and still have not argued against this motivation.* In any case, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. In a claim drawn to a process of making, the intended use must result in a manipulative difference as compared to the prior art. See *In re Casey*, 152 USPQ 235 (CCPA 1967) and *In re Otto*, 136 USPQ 458, 459 (CCPA 1963).

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Applicants have argued that the Examiner is relying on speculation and unfounded assumptions (page 7, paper # 15); however, Applicants have not explained why “*intended use*” is not applicable to the issue at hand. *Applicants are claiming an intended use for their earlier disclosure relating to simulation of particle flow past a simulated automobile.* Applicants have not made a persuasive argument to the contrary.

Applicants also appear to allege that “*spray gun placement “code means”*” and “*trajectory determination “code means”*” are not disclosed in the prior art. It is noted that Applicants have not disclosed any code in the specification to any greater degree than disclosed in the prior art. In fact, the code means appears to refer to “PowerFlow” developed by EXA (see the Miller et al. non-patent art for a disclosure of PowerFlow).

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

Hugh Jones

Primary Patent Examiner

Daniel H. Bliss

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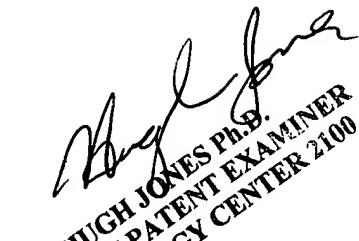
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